



DEPARTMENT OF THE ARMY

VICKSBURG DISTRICT, CORPS OF ENGINEERS
4155 CLAY STREET
VICKSBURG, MISSISSIPPI 39183-3435

REPLY TO
ATTENTION OF:

March 22, 2010

Office of Counsel

Trudy B. Allen, Esquire
Watkins Ludlam Winter & Stennis P.A.
633 North State Street
P. O. Box 427
Jackson, MS 39205

Dear Trudy:

I have read the 8 March 2010 letter from the Rankin-Hinds Pearl River Flood and Drainage Control District addressed to Colonel Eckstein. I believe some confusion still exists over the authority granted by the Water Resources Development Act of 2007. Section 3104 of WRDA 2007 (c)(1) provides in part that the Secretary of the Army may construct the national economic development plan or locally preferred plan or some combination thereof if the locally preferred plan is environmentally acceptable and technically feasible. I remember that you took the position previously that this language exempted the locally preferred plan from the provisions of the National Environmental Policy Act. You will remember that I disagreed with your position. I provide the following legal discussion for your review.


The Fifth Circuit Court of Appeals in the case of *Sierra Club v. Froehlke*, 816 F.2d 205, 215 (5th Cir. 1987) stated in part, that, "Congress may repeal, amend or ignore any statute it has enacted. *Manigault*, 199 U.S. at 487, 26 S.Ct. at 133. Indeed, as the district court itself recognized, Congress may exempt a given project from NEPA's procedural requirements. *Wallisville II*, 630 F.Supp. at 1225; see *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 355 (8th Cir.1972)." It is clear then that Congress may exempt a particular project from the provisions of NEPA. The question is what language is needed in legislation to achieve that result.

I refer you to recent case of *Miccosukee Tribe of Indians of Florida v. USA*, 650 F.Supp.2d 1235, 1240 (S.D. Fla. 2009) that stated, "As the Court has previously noted, congressionally mandated project-specific exemptions from the reach of statutes such as NEPA must be explicit. See *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992) (stating that Congress has the power to amend, suspend, or repeal a statute through an appropriations bill, as long as it does so clearly); see also *Sierra Club v. Andrus*, 610 F.2d 581, 601 (9th Cir.1979); *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 367-68 (D.C.Cir.1981)" I do not read the language of Section 3104 of WRDA 2007 to contain that

project specific exemption explicit language sought by the courts.

If you have legal research that shows a contrary result, I would appreciate reviewing those cases.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. H. Black', with a stylized flourish extending to the right.

Henry H. Black
District Counsel